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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re the Marriage of ERIC CARLSON
and PATTY CARLSON.**

**ERIC CARLSON,
Appellant,**

v.

**PATTY CARLSON,
Respondent.**

**A103163
A103820**

**(Marin County
Super. Ct. No. FL 012690)**

After he signed a marital settlement agreement that divided community property, Eric Carlson allegedly discovered that his wife had mishandled community funds following their separation. He moved to set aside the judgment on the grounds of fraud, breach of fiduciary duty, violation of statutory disclosure requirements, and mistake. The court denied his motion based on waivers in the marital settlement agreement. We reverse, holding that the waivers did not bar Eric's claims and remand for factual findings on those claims.

FACTUAL & PROCEDURAL BACKGROUND

After a seven-year marriage, Eric and Patty Carlson¹ separated in May 2001 and Eric filed for dissolution a few days later. With the assistance of a mediator, the couple drafted a Marital Settlement Agreement (MSA).

The MSA purported to settle the parties' rights and obligations regarding the characterization and division of community property, as well as spousal support, child support and child custody. Both Eric and Patty expressly waived their right to discovery "as to the character or value of the parties' property, the extent of debt, or the amount of income of each party"; acknowledged that the MSA may or may not result in an equal division of the community property; and stated that they were entering into the agreement voluntarily and against the advice of counsel regarding discovery. "The parties have accepted the statements of each other as to the value of the community assets and, in order to minimize the legal costs, [each] has directed [his or her] attorney to do no discovery." They also warranted that they did not own property other than the property set forth in the MSA, and they agreed, "If it later appears that either warrantor now owns any other property and that the warrantee has an interest in that other property, the warrantor shall transfer or pay to the warrantee" the value of the property. This warranty paragraph provided, "This section shall not impair the availability, in a court of competent jurisdiction, of any other remedy arising from the undisclosed ownership of any property."

Eric and Patty signed the MSA in June 2002.² Before signing the MSA, Eric and Patty exchanged preliminary declarations of disclosure, as required by Family Code section 2104.³ Concurrently with signing the MSA, Eric and Patty signed a Stipulated

¹ Adopting the convention of the parties, we use first names.

² Patty's attorney signed the MSA in October 2002; Eric's attorney never signed it.

³ All statutory references are to the Family Code unless otherwise indicated.

Waiver of Final Disclosure Declarations pursuant to section 2105, subdivision (d). As required by statute, they stated that they had fully complied with their statutory duties of full and accurate disclosure, including disclosure of all material facts and information regarding the characterization and value of all community assets and liabilities. They acknowledged that “this waiver does not limit the legal disclosure obligations of the parties, but rather is a statement under penalty of perjury that those obligations have been fulfilled,” and that “noncompliance with those obligations will result in the court setting aside the judgment.” (See § 2105, subd. (d)(5).) The MSA also included a provision waiving final declarations of disclosure, which purported to limit the parties’ remedies for noncompliance with the disclosure obligations.

On November 26, 2002, Eric informed Patty, her attorney and the mediator that he and his attorney had decided to repudiate the MSA. He alleged that Patty had committed fraud and stolen community funds. Patty, an accountant with 20 years of experience, had sole responsibility for the couple’s finances throughout the marriage, and Eric, a computer consultant for Ernst and Young, claimed he relied on her disclosures to value the couple’s community funds. It was after he signed the MSA when Patty asked him to reimburse her for community bills he had already paid that Eric became suspicious of Patty’s accounting of community finances. He obtained copies of bank statements for the couple’s joint accounts and asked Patty for explanations of apparent discrepancies between the statements and her characterizations of the accounts. Patty responded to Eric’s inquiries and produced the couple’s financial records for his review, but Eric remained unsatisfied.

On December 24, 2002, Patty filed a motion to enter judgment in accord with the MSA, pursuant to Code of Civil Procedure section 664.6. Eric opposed the motion and filed a motion to cancel and set aside the MSA based on Patty’s alleged breach of

fiduciary duty, failure to comply with statutory disclosure requirements, perjury and fraud. He argued that Patty failed to disclose \$45,892.18 in community assets that were in the couple's Sage Ruddy account (#1978-9958) at the time of their separation.

The trial court granted Patty's motion and denied Eric's, concluding: "In their Marital Settlement Agreement, the parties stated they had conducted no discovery and that each relied on their own investigation and judgment with regard to the value of all property. The parties also executed a stipulated waiver of the exchange of final declarations of disclosure. The parties warranted that they owned no other property of any kind other than as set forth. The Agreement then states that if other property is in fact owned, the other party may elect to receive their interest in such property or the full market value on the date of the Agreement or at the time of the discovery of the ownership. Those provisions control undisclosed interests by either party."

At the hearing on the motion, the court further elaborated, "I made no ruling whether there is fraud or whether there were assets that were disclosed or not, just that this agreement is entitled to be enforced and therefore it could be filed and made part of the Judgment. . . . [¶] If you then, counsel, say: Well, there is fraud in there, then there is a whole procedure for that in [Civil Code sections 2120-2122]. All those sections apply and *I made no ruling on those*. [¶] . . . [I]t's just that the agreement is enforceable." (Emphasis added.)

Eric subsequently filed a motion to set aside the judgment pursuant to section 2122 on the grounds of fraud, perjury, mistake of fact and failure to comply with statutory disclosure requirements. In addition to the allegation that Patty failed to disclose more than \$45,892 in community assets, he alleged that Patty had deprived him of more than \$50,000 in other community funds by requiring him to reimburse her for community bills that had been paid from community funds and by spending community funds on her personal expenses.

The trial court denied the motion, finding it was tantamount to a motion for reconsideration of its prior order. At the hearing, Eric asked the court to clarify the basis of its decision, and specifically asked whether the court was ruling that the terms of the MSA “trumped” all possible grounds for setting aside the judgment under sections 2105 and 2120. The court responded that Eric’s prior motion involved the same issues as the current one, and stated, “You can infer I guess whatever you wish to as a legal basis.”⁴

Eric appeals both the judgment and the order denying his motion to set aside the judgment. His appeals have been consolidated and both are addressed in this opinion.

DISCUSSION

The issues before us are whether the waiver provisions in the MSA bar Eric’s claims for fraud, breach of fiduciary duty, violation of statutory disclosure requirements (including perjury) and mistake; and if not, whether Eric presented evidence substantiating a claim that the alleged bases for relief materially affected his conduct in signing the MSA and that he would materially benefit from the set-aside. (§ 2121, subd. (b); *In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1345.) Because the issues in Eric’s prejudgment and postjudgment motions overlap and the court did not clearly articulate distinct grounds for denial of each motion, we discuss the issues as they affect both motions.

⁴ The court stated, “I do recall your position at the oral argument previously back in March, and your effort to get me to make a ruling that if you are going to lose, at least we will be in a position that you might be able to appeal. [¶] And I didn’t have the transcript in front of me. You said I made certain statements. But just listening to you, the same issues that it revolved on disclosure and undisclosed assets are covered on the marital settlement agreement and I enforced those. [¶] So I am standing by the tentative ruling. You can infer I guess whatever you wish to as a legal basis.”

I. *Eric's Postjudgment Motion Was Improperly Denied as a Motion for Reconsideration*

As a preliminary matter, we conclude that Eric's postjudgment motion was improperly denied as a motion for reconsideration. At the prejudgment hearing to set aside the MSA, the court explained that it was making no ruling on Eric's claims of fraud and nondisclosure of assets and that the remedies in sections 2120 to 2122 remained available to Eric. Eric filed his subsequent motion under section 2122. His motion did not seek reconsideration of the court's prior order but sought a ruling on issues the court expressly left open. Patty concedes on appeal that Eric's postjudgment motion should not have been denied as an improper motion for reconsideration.

II. *The Waivers in the Marital Settlement Agreement Did Not Bar All of Eric's Claims*

We consider the effect of the following legal principles and provisions in the MSA on Eric's claims: (1) the warranty provision expressly preserves the parties' legal remedies regarding undisclosed assets; (2) the parties' statutory duties of full and accurate disclosure are nonwaivable; (3) the waiver of final disclosure declarations expressly acknowledges that the parties remain liable for noncompliance with statutory disclosure requirements; (4) the discovery waiver relieves the attorneys of malpractice liability, but does not waive the parties' legal remedies against each other; and (5) fraud cannot be waived by the provisions of a fraudulently induced contract.⁵

First, the MSA warranty provision does not bar Eric's claims. In denying Eric's prejudgment motion to set aside the MSA, the court focused on paragraph 35 of the MSA, "Warranty re: Property," which gives the parties a contractual right to recover their interests in undisclosed property discovered after the MSA was signed. This paragraph

⁵ We note that Eric's claim for mistake of fact (§ 2122, subd. (e)) may be affected by his waiver of his right to full discovery, but this issue has not been briefed by the parties or addressed below and we defer to the trial court to consider the issue in the first instance.

provides that it “shall not impair the availability, in a court of competent jurisdiction, of any other remedy arising from the undisclosed ownership of any property.” In light of this express reservation of rights in paragraph 35, the further provision in the same paragraph creating a contractual mechanism to divide later-discovered community property cannot reasonably be construed to be an exclusive remedy.

Second, statutory fiduciary duties are not waivable except as provided by statute. “ ‘Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.’ ” (*In re Marriage of Fell* (1997) 55 Cal.App.4th 1058, 1063, quoting Civ. Code, § 3513.) Section 2100 declares a public policy in favor of full and accurate disclosure of community assets and liabilities, including a continuing duty to update and augment such disclosures, in order to ensure fair and sufficient child and spousal support awards and a lawful division of community property. The Code imposes a fiduciary duty on spouses to fully and accurately disclose all separate and community assets and obligations and to update or augment those disclosures. (§ 2102; see also § 721.) This obligation, which carries out the public policy announced in section 2100, is not by its terms restricted to the exchange of preliminary and final declarations of disclosure. The code provides no mechanism to waive this fiduciary duty and it cannot be waived by private agreement. (Cf. *Fell*, at p. 1063.)

Third, although the Family Code permits parties to waive the formal exchange of *final* declarations of disclosure, the stipulated waiver does not bar all of Eric’s claims. (§ 2105, subd. (d).) Before the Legislature enacted the waiver provision, waivers were not permitted because spouses “could not stipulate to violate these statutory pronouncements effectuating public policy.” (*Fell, supra*, 55 Cal.App.4th at p. 1064.) Since enactment of the statutory waiver mechanism, a waiver can be effective only if the statutory requirements are strictly observed. (Cf. *Fell*, at p. 1065) As required by section 2105, subdivision (d), Eric and Patty averred in the stipulated waiver that they

had fully complied with their fiduciary duties of disclosure; acknowledged that the waiver did not limit their legal obligations, but “rather is a statement under penalty of perjury that those obligations have been fulfilled”; and acknowledged further that “noncompliance with those obligations will result in the court setting aside the judgment.” By its own terms, the stipulated waiver does not bar Eric’s claims for breach of fiduciary duty or violation of disclosure requirements. However, the MSA provision “[e]ach party understands that by entering into this waiver he or she may be affecting his or her ability to have the judgment set aside as provided by law,” whatever else it means, may not be interpreted to limit the parties’ legal disclosure obligations. Section 2105 provides that, despite any waiver, “noncompliance with those obligations will result in the court setting aside the judgment.” (§ 2105, subd. (d).)

Fourth, in light of the parties’ statutory duties and their affirmative representations in the MSA and the stipulated waiver, their waiver of discovery in the MSA cannot be construed to bar all of Eric’s claims, as the trial court ruled. In paragraphs 21 and 22, Eric and Patty waived their right to discovery as to the character and value of the parties’ property and acknowledged that the division of community property consequently might be unequal. The parties expressly absolve their attorneys of any malpractice liability.⁶ In contrast, the parties do not expressly waive any remedies they might have against each other; in fact, as previously noted, paragraph 35 expressly preserves their legal remedies regarding undisclosed assets. However, as discussed below, Eric must persuade the trial court that the facts alleging fraud materially affected the outcome and that he would

⁶ After acknowledging their waiver of discovery, each party agreed that to having entered into the MSA “voluntarily and against the advice of [her or his] counsel regarding discovery and valuation of the assets and [debts or pre lump-sum payment of spousal support debts] and hereby releases [her or his] attorney from any liability resulting from this Agreement.”

materially benefit from relief (§ 2121, subd (b)) before he can overcome his waiver of disclosure. He is not presently entitled to discovery.

Finally, waivers in the MSA cannot bar Eric's claim for fraudulent inducement. Patty notes that Eric declared in paragraph 54 that he entered into the MSA "free from fraud," and argues that other waivers in the MSA also bar his claim for fraudulent inducement. A party guilty of fraudulent inducement cannot absolve itself from the effects of the fraud by including a waiver in the fraudulently induced contract. (*Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Development Corp.* (1995) 32 Cal.App.4th 985, 994, fn. 7.)

We conclude that the trial court erred when it ruled that all of Eric's claims were barred by waivers in the MSA.

III. *The Trial Court Must Make Factual Findings on Eric's Claims*

We cannot determine from the trial court's orders or comments at the hearing whether it made any findings of fact regarding Eric's claims. Because of the state of the record, we remand to the trial court to make factual findings.

Eric presented four theories for setting aside the MSA and judgment, based on alleged mishandling of community funds. Eric's legal theories are (1) actual fraud, including fraudulent inducement of the MSA rendering it a voidable contract and fraud as a ground for setting aside the judgment under section 2122, subdivision (a); (2) breach of fiduciary duty, which constitutes constructive fraud rendering the MSA voidable; (3) violation of statutory disclosure requirements and perjury on declarations of disclosure, a ground for setting aside the judgment under section 2122, subdivisions (b) and (f); and (4) mistake of fact, a ground for setting aside the judgment under section 2122, subdivision (e). The alleged misconduct relates to Patty's failure to disclose and divide \$45,892.18 in community assets that were in the couple's Sage Ruddy account at the time of their separation; Patty's post-separation demands for

reimbursement from Eric for one-half of community expenses that were paid from community funds or that Eric had already reimbursed; and Patty's post-separation use of community funds to pay her personal expenses.⁷

To prevail on his claim for actual fraud, Eric must establish that Patty misrepresented or concealed a fact material to the contract with an intent to induce him to enter the contract, and Eric relied on the false representation to his detriment. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 393, p. 356 (Witkin); Civ. Code, § 1572.) To prevail on his claim for constructive fraud, Eric must establish that Patty breached a fiduciary duty and thereby gained an advantage over Eric to his prejudice; he need not establish fraudulent intent. (Witkin, at § 400, p. 360; Civ. Code, § 1573.) To establish any of his grounds for relief under section 2122, Eric must establish that Patty's alleged wrongdoing materially affected the judgment and that Eric would materially benefit from the granting of relief. (§ 2121, subd. (b).)

On remand, the trial court must determine in the first instance whether Eric presented evidence substantiating his claim that the alleged bases for relief materially affected his conduct in signing the MSA and that he would materially benefit from the set-aside, making factual findings to support its decision.⁸

⁷ As to the latter two categories of alleged misconduct, we note that in paragraph 30 of the MSA Eric and Patty expressly waived their rights to reimbursements for payments of community expenses after separation or for one spouse's use of community assets after separation. The trial court did not address the effect of this waiver on Eric's latter two claims and the parties have not briefed the issue on appeal. We leave it to the trial court to address this issue in the first instance.

⁸ We acknowledge that Eric's trial court briefs were not helpful to the trial court. He included statements of facts without specific citations to supporting evidence, sections that set forth the applicable law as a list of legal rules and statutory quotations, with no discussion or analysis, and an "argument" section that associates various facts with Eric's theories of relief, but generally fails to apply the law to those facts in an illuminating fashion. (Cf. *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116 [appellate court may deny claim on appeal that is unsupported by legal argument applying legal principles to the particular facts of the case on appeal].) Eric's appellate

DISPOSITION

The order denying the motion to set aside the judgment is reversed. The case is remanded with direction to the trial court to consider the merits of appellant's claims in accord with the opinions expressed herein and to make findings of fact based on evidence previously before it. Appellant shall recover costs on appeal.

GEMELLO, J.

We concur.

JONES, P.J.

SIMONS, J.

briefs are somewhat better. In the exercise of its power to manage this litigation, the family court may judicially notice the appellate briefs as an aid to its findings of fact and conclusions of law, and/or otherwise direct the parties to present further written or oral argument as the family court deems appropriate and necessary.